[Filed Oct. 26, 1998]

NO. 98-80691 S

IN THE SUPREME COURT
OF THE STATE OF KANSAS

STATE OF KANSAS,
Plaintiff-Appellee,
vs.
ROGER DRACH,
Defendant Appellant.

BRIEF OF DEFENDANT-APPELLANT,
ROGER DRACH

**[Excerpts of brief on direct appeal below]**

* * * *

**IV. THE COURT ERRED IN ALLOWING HEARSAY TESTIMONY OF PRIOR "BAD ACTS" OF THE DEFENDANT TOWARD THE DECEDENT.**

"*Res gestae*" is a Latin term meaning "things done" which includes circumstances, facts and declarations incidental to the main fact or transaction. 29 AmJur 2nd, Evidence, §860. *Res gestae* evolved as a common law rule of evidence which permitted the introduction of out of court statements into evidence over a hearsay objection. The concept was abolished in the federal system with the enactment of the Federal Rules of Evidence which set forth with specificity those exceptions which were permissible despite the provisions of the hearsay rule. *Miller v. Keating*, 754 F.2d. 507, 509 (3rd Cir. 1985); *Stephens v. Miller*, 13 F.3d 998, 1003 (7th Cir. 1994). Similarly, after the Kansas legislature enacted rules of evidence for Kansas courts, the Kansas

Supreme Court held in 1970 that lingering common law doctrines like *res gestae* were abolished. *State v. Jones*, 204 Kan. 719, 466 P.2d. 283 (1970).

Despite the prohibitions enunciated by the Kansas Supreme Court in *State v. Jones*, *supra*, the Court has somehow deemed that *res gestae* evidence is admissible to allow a witness to testify what someone else said that yet a third person said without specific evidence concerning the circumstances of the making of the out of court statements. *State v. Gadelkarim*, 256 Kan. 671, 887 P.2d 88 (1994).

In short, the court's ruling regarding the inclusion of *res gestae* type evidence in a trial setting not only improperly amends the Kansas Rules of Evidence, but it also violates the confrontation clause of the United States Constitution. In a thoughtful article published in 65 J.K.B.A. (October, 1996) entitled "*Res Gestae Raises Its Ugly Head*", Professor Dennis D. Prater and Lieutenant Virginia M. Klemme analyze the problems created by the rebirth of *res gestae* in Kansas. In addition to the faults pointed out by defendant in this argument, the authors state without equivocation that "in the criminal context against the defendant, the court's *res gestae* analysis runs afoul of the confrontation clause." (P. 29)

Defendant submits that the debate over whether *res gestae* evidence is admissible was resolved in Kansas in 1963 when the legislature enacted the Kansas Rules of Evidence (K.S.A. 60-401 et. seq.) Specifically, K.S.A. 60-460(d)(1)(2) and (3) state:

> "Evidence of a statement which is made other than by a witness while testifying at the hearing, offered to provide the truth of the matter stated, is hearsay evidence and inadmissible except:
>
> (d) A statement which the judge finds was made (1) while the declarant was perceiving the event or condition which the statement narrates, describes or explains, (2) while the

> declarant was under the stress of a nervous excitement cause by such perception or (3) if the declarant is unavailable as a witness, by the declarant at a time when the matter had been recently perceived by the declarant and while the declarant's recollection was clear and was made in good faith prior to the commencement of the action and with no incentive to falsify or to distort."

It is important to note that (d)(1) and (d)(2) clearly illustrate that the Kansas legislature intended to limit *res gestae* type evidence solely to the present sense impression and excited utterance exceptions to the hearsay rule. This was noted by Judge Spencer Gard, Code of Civil Procedure Revision – Evidence, 31 J.B.A.K. 194, 198 in commenting on two expansions of the hearsay doctrine in the proposed rules of evidence (and what ultimately became K.S.A. 60-460(d)(3)):

> "The other one is an exception in subsection (d)(3), and that one would expand the scope of what we loosely call "*res jeste*" statements. In other words, spontaneous explanation or statements made while the witness was observing the thing about which he wants to testify. That could be expanded a little bit to include those borderline situations where the trial judge finds that the declaration, even though not strictly spontaneous, not strictly res jeste, nevertheless was made under circumstances which indicate that there could have been no incentive whatever on the part of the declarant misstating what he said."

The Court in *State v. Gadelkarim*, *supra*, obliterated the protections afforded by K.S.A. 60-460(d)(1)(2) and (3) and revived *res gestae* phraseology in order to permit the introduction of inadmissible hearsay evidence. In so doing, the Kansas Supreme Court has violated the confrontation clause of the United States Constitution.

In *Gadelkarim*, the defendant was charged with the murder of his girlfriend, Debra Cagle. The defendant and Ms. Cagle had had a stormy relationship. Prior to the murder, the defendant had been charged with indecent liberties with

one of Ms. Cagles's children. The defendant was convicted of indecent liberties on November 30, 1988. On December 3, 1988, Debra Cagle was found dead in her home and the defendant was charged with first-degree murder.

In order to meet its burden on the premeditation issue, the state offered the testimony of Christine Moline, a friend of Ms. Cagle. Ms. Moline testified that at some unknown time during the indecent liberties trial, Ms. Cagle told her (Ms. Moline) that the defendant had told Ms. Cagle if he had to go to prison he would kill himself and take others down with him.

The state also offered the testimony of Patricia Murphy, another friend of the victim. Ms. Murphy testified that Ms. Cagle had told her at some unspecified time that the defendant and Ms. Cagle had argued and further, that Ms. Cagle had received a red mark on her face in the heat of the argument. It is interesting to note that Ms. Moline was unable to provide specific evidence concerning the emotional status of Ms. Cagle when she conveyed the information to either witness. Nor was there any evidence presented concerning the time of any events in relation to the conversations.

The defendant was convicted and on appeal argued that the statements of Ms. Moline were inadmissible hearsay because they did not meet the requirements of K.S.A. 60-460(d)(3), the only possible statutory exception to hearsay that might apply to these statements. The Kansas Supreme Court was unable to find any applicable statutory exception to the hearsay rule, but nonetheless upheld the introduction of the evidence by employing the following *res gestae* analysis:

> *Res gestae* evidence is that evidence which does not constitute a portion of crimes charged but has a natural necessary, or logical connection to the crime ...

> *Res gestae* is a broader concept than an exception to the hearsay rule. It actually deals with admissibility of evidence of acts or declarations before, during or after happenings of the principal event. Those acts done or declarations made before, during or after the happening of the principal occurrence may be admitted as part of the *res gestae* where those acts or declarations are so closely connected with the principal occurrence as to form in reality a part of the occurrence. *State v. Sherry*, 233 Kan. 920, 667 P.2d 367 (1983). *Res gestae* includes those circumstances which are automatic and undersigned incidents of the particular litigated act, which may be separated from the act by lapse of time but are illustrative of such act. It is the whole of the transaction under investigation or being litigated and every part of it. Acts done or declarations made before, during, or after the principal occurrence may be admissible as part of the *res gestae* to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. *State v. Peterson*, 230 Kan. 821, 829, 696 P.2d 387 (1985).
>
> *State v. Gadelkarim*, *supra*, at 687-688.

*Res gestae* was never meant to establish such a position as set forth by the Kansas Supreme Court.

The court's language that *res gestae* in the hearsay setting is "evidence which has a logical connection to the crime" and is, therefore, admissible is grossly over broad and not historically justifiable. Further, the court's definition takes trustworthiness out of the equation. In short, the court's definition read literally and as applied in *State v. Gadelkarim*, contradicts the very purpose for the hearsay rule and the policy justifications for its exceptions to the rule. Plainly stated, hearsay is inadmissible because it is not trustworthy. The declarant is not available for cross examination, thus the declarant's ability to perceive the event and communicate information cannot be tested. Also, since the declarant is not before the finder of fact, the finder is not

able to determine the declarant's demeanor. For these reasons, hearsay has always been regarded with disfavor and held inadmissible.

Defendant further submits that the admission of *res gestae* evidence should be prohibited on the grounds that the admission of this type of evidence constitutes a substantive change of the law as opposed to a procedural change. Specifically, K.S.A. 60-402 sets out the scope of the rules. That section states:

> "Scope of rules. Except to the extent to which they may be relaxed by other procedural rule or statute applicable to the specific situation, the rules set forth in this article shall apply in every proceeding, both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced." (Emphasis added.)

Neither the Kansas Rules of Civil Procedure, nor the Kansas Rules of Criminal Procedure even remotely mention *res gestae* evidence; nor does any other statute authorize the use of *res gestae* evidence. Therefore the admission of *res gestae* evidence creates a substantive change or modification of the Kansas Rules of Evidence and not a procedural change in the law. Hearsay exceptions are substantive and the trial court and the Kansas Supreme Court are therefore statutorily bound by the Kansas Rules of Evidence to apply the hearsay rule and its exceptions to any evidence that the State may seek to introduce at the time of trial.

In *State v. Clark*, 931 P.2d 664 (1997) the issue of admissibility of *res gestae* evidence was discussed by the Kansas Supreme Court. The court indicated that *res gestae* evidence is somehow admissible as evidence of other crimes and civil wrongs pursuant to K.S.A. 60-455, if such evidence passes judicial scrutiny under the provisions of K.S.A. 60-455 and K.S.A. 60-448. Both of these rules of evidence provide that such evidence may be admissible when relevant to prove some other material fact including motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Thus in *Clark*, *supra*, the state's theory for admission of *res gestae* evidence was that Clark killed Lynette (his girlfriend/fiancee) because he was angry that she wanted him to move out of their residence and further that he was allegedly jealous of her contacts with other men. Specifically, the state sought to admit evidence of the parties' discordant relationship. The Court further determined that the prior statements concerning the relationship of Clark and Lynette were relevant as they were indicative of motive, intent, and absence of mistake and were therefore admissible.

Defendant submits that the importance of the *Clark* decision is that the Kansas Supreme Court indicated that prior to the admission of prior bad acts/*res gestae* evidence as evidence of marital discord, there must be some nexus or connection in time between the date that the purported statements or acts allegedly occurred and the date the subsequent criminal acts (such as the alleged murder of Deanne Drach) occurred.

Defendant submits that a review of other Kansas cases where evidence of marital discord was allowed by the trial court indicates that upon appellate review the court also required some showing of closeness or proximity between the alleged marital discord and the subsequent criminal activity.

For example in *State v. Wood*, 230 Kan. 477 (1982), the court allowed the state to introduce testimony of the defendant's prior threats and criminal misconduct toward his wife as evidence of marital discord. Specifically, the witnesses testified that the defendant had problems controlling his temper and had been violent with his wife (the victim) on several occasions shortly before her untimely death. The testimony elicited during the trial indicated that Ms. Wood had planned to leave her husband, however she

did not because she was afraid that he would follow her and kill her and would not let her take their baby. Additionally, defendant had allegedly stated to a friend two to three weeks before the killing that he would "blow his old lady's head off." Finally, testimony was presented that on one prior occasion defendant had abused his wife while holding a loaded gun in his hand and that on the day before the homicide, he had been arguing with her and struck her.

It should be noted that in the *Wood* case, the date of death was December 8, 1979. On December 7, 1979, the victim had called her mother approximately seven hours before the crime occurred and advised her that she had been beaten by her husband and that he threatened to kill her. Defendant submits that the *Wood* case is important in that this court focused on the dates or times when the statements were made in relation to the proximity to the death.

Ironically, in the *Wood* case, the state did not attempt to elicit testimony from any of their witnesses of the history of the parties' discordant marital relationship.

A similar situation arose in *State v. Green*, 232 Kan. 116 (1982). In that case, defendant Green was convicted of first degree murder of his wife. Evidence of marital discord in the weeks preceding the victim's death was present including an instance where Green had threatened to send his wife back to Africa in a pine box. Neighbors testified that the victim was afraid of Green. (Emphasis added.) In *State v. Fenton*, 228 Kan. 658 (1980), the trial court allowed evidence of a discordant marital relationship between the defendant and the victim which consisted of the defendant's previous ill treatment of his wife, including his prior threats to kill her.

In *Fenton*, the state presented the testimony of LoVae Blounk. Mrs. Blounk was the sheriff's wife and occasionally assisted the sheriff as a matron. Mrs. Blounk testified that on February 10, 1975, she met the deceased, Mrs. Fenton, after the appellant sought a court order for protective custody. Apparently, the Fentons had become embroiled in a marital

dispute which climaxed when Mrs. Fenton threw a butcher knife at the appellant. Mrs. Blounk testified that she sat in on conversations between the Fentons and county judge and between the Fentons and the county medical officer. The focal point of Ms. Blounk's testimony was "Dr. Stucky told them that they could leave at which time Mrs. Fenton asked Norman if he was ready to go home and he said, 'Yes, but if this happens again, I'll kill you.'"

Mrs. Blounk further testified that Mrs. Fenton told Dr. Stucky that she and the defendant always threatened each other during arguments, but that they did not mean it. Mrs. Blounk testified with the aid of written notes which she had prepared in November of 1975, shortly after the murder of Mrs. Fenton on November 28, 1975.

Although the statements made by Mrs. Blounk were admitted nearly five years after the date of Mrs. Fenton's death, it should be noted that the defendant was not charged until approximately 1980 in the death of his wife. In determining or evaluating the liability of the statements, it was determined that as the notes of Ms. Blounk were prepared shortly after the victim's death, apparently the notes were reliable; therefore, the trial court allowed Mrs. Blounk to testify utilizing her notes. Once again, this court focused on the fact that the notes were prepared in relative close proximity to the murder that the witness was testifying to.

In this particular case, the state introduced evidence which covered the past twenty-four to thirty years of the defendant's marital relationship with his wife. Evidence was admitted of a highly generalized nature. Defendant submits that it was virtually impossible for him to present an adequate defense and confront witnesses when their testimony was based upon not only hearsay statements of the deceased, but arguably double and triple hearsay statements from other witnesses as well. Additionally, defendant submits that many of the decedent's statements or perceptions were provided to numerous witnesses while she

was severely intoxicated. (Several of the statements of key witnesses for the state verify that decedent was severely intoxicated at the time these statements were allegedly made. The second autopsy which was conducted in March 1997 also verified that the decedent had a terrible drinking problem, largely due to the condition of her liver.) In addition, there was evidence that decedent would retract an accusation when in a different mood or effect.

Defendant submits that the reliability and trustworthiness of these statements was highly suspect and, therefore, should not have been allowed. Finally, defendant had absolutely no effective manner in which to cross-examine any of the State's witnesses in regards to these "statements/ declarations" purportedly made by the alleged victim.

In *State v. Gadelkarim*, 256 Kan. 671 (1994) citing *State v. Sherry*, 233 Kan. 920, the court held that *res gestae* evidence concerns those acts done or declarations made before, during or after the happening of the principal occurrence and therefore may be admitted as part of the *res gestae* where those acts or declarations are so closely connected with the principal occurrence as to form a reality a part of the occurrence." The evidence which the State sought to introduce concerning the thirty-year marriage of the defendant was not in any way closely related to the charges of first degree murder or aggravated battery in this case. Therefore, in light of the rationale of the court in *State v. Gadelkarim*, the trial court should have excluded any and all evidence of marital discord unless the State could have presented evidence that displayed some closeness or proximity in time to the death of Deanne Drach.

Defendant further asserts that the trial court committed reversible error in allowing the State's various witnesses to testify concerning any statements that the decedent Deanne Drach allegedly made prior to her death as such statements constituted a violation of the confrontation clause of the United States Constitution.

In the article by Prater and Klemme quoted earlier, they point out that *Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 597, 107 S. Ct 2531 (1980) sets forth a two-prong test necessary to satisfy the confrontation clause; unavailability and reliability. The latter is totally lacking in foundation and fact in the instant case. It should be further observed that the hearsay statement is not grounded in a "firmly rooted hearsay exception." *White v. Illinois*, 502 U.S. 3246, 112 S. Ct. 736 (1992) details" firmly rooted exceptions to hearsay" *res gestae* is not among those recognized in the federal courts. The Kansas legislature chose not to include it as an exception in the Code of Evidence. At least one member of this court has recognized that *res gestae* is no longer a part of the law of evidence in Kansas. See SIX, concurring in *State v. Edwards*, 264 Kan. 177, 955 P.2d 1276. Judge Gard and Prater and Klemmes believed *res gestae* was dead when this court decided *Jones*, *supra*. It is clear that *res gestae* has no firm rooting as an exception to the hearsay rule and the use as in this case constitutes a violation of the constitutional right to confront and cross-examine the witnesses against the defendant. He lost the right to test the reliability of accusatory statements made by those with no knowledge of the truth of falsity of their hearsay utterances. This is the crux of lack of confrontation and a denial of a very basic constitutional framework of the criminal justice system. It may only be made right by granting the defendant's request for a new trial without such impediments.

## CONCLUSION

The defendant, Roger Drach, deserved a fair trial. He did not get it. The evidence of suicide was overwhelming, but was overcome by the prejudicial effect of the errors complained of in this brief. Justice demands that the court right this wrong and grant the defendant a new trial.

Respectfully submitted,

By: /s/
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ATTORNEYS FOR
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